

HONORABLE JUDGE ROBERT J. BRYAN

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

C. P., by and through his parents,
Patricia Pritchard and Nolle Pritchard;
and PATRICIA PRITCHARD,

Plaintiffs,

vs.

BLUE CROSS BLUE SHIELD OF
ILLINOIS,

Defendant.

Case No. 3:20-cv-06145-RJB

**BLUE CROSS BLUE SHIELD OF
ILLINOIS'S SURREPLY OPPOSING
MOTION TO STRIKE CARR REPORT**

**NOTE ON MOTION CALENDAR:
NOVEMBER 2, 2022**

I. INTRODUCTION

Pursuant to LCR 7(g), Defendant Blue Cross Blue Shield of Illinois (“BCBSIL”) hereby files this surreply in response to Plaintiffs’ Subjoined Motion to Strike the Expert Report of Scott Carr. [Dkt. 99] (“Motion to Strike”). BCBSIL timely disclosed the rebuttal report of Dr. Scott Carr within 30 days of Plaintiffs’ disclosure of the amended report of Dr. Frank Fox. *See* Ex. A (the “Carr Rebuttal Report”), Ex. B (the “Amended Report”). Thus, Plaintiffs’ contention that Dr. Carr’s rebuttal report is untimely is wrong and misconstrues the timing of Plaintiffs’ own expert disclosures. Indeed, this Court has recognized that the Federal Rules of Civil Procedure require that rebuttal reports may be submitted within 30 days of any expert report unless the Court has ordered a different deadline.

The Court should deny Plaintiffs’ Motion to Strike. In the alternative, the Court should also strike Plaintiffs’ untimely disclosure of the Fox Amended Report, which was also disclosed after the close of expert discovery.

II. FACTUAL BACKGROUND

The deadline to serve expert witness disclosures in this action was June 17, 2022. *See* Dkt. 48. While Plaintiffs identified Dr. Frank Fox by name on that date, Plaintiffs did not serve Dr. Fox’s initial report until August 19, 2022 and did not serve his Amended Report until September 29, 2022. *See* Ex. C (Dr. Fox’s initial report); Ex. B.

On October 21, 2022, twenty-two days after the disclosure of Dr. Fox’s Amended Report, BCBSIL timely disclosed the Carr Rebuttal Report, which responded to Dr. Fox’s Amended Report.

III. ARGUMENT

A. **BCBSIL timely disclosed the rebuttal report of Dr. Scott Carr within 30 days of the amended report of Dr. Frank Fox.**

The parties were required to disclose their rebuttal witnesses within 30 days after the other party’s disclosure. *See* Fed. R. Civ. P. 26(a)(2)(D)(ii). This Court has recognized that Fed. R. Civ. P. 26(a)(2)(D)(ii) requires that rebuttal reports may be submitted within 30 days of any expert report unless the Court has ordered a different deadline. *Romero v. Washington*, No. C20-1027-TL-MLP, 2022 WL 952242, at *2 (W.D. Wash. Mar. 30, 2022) (“Defendants disclosed their rebuttal expert within 30 days of the date Plaintiff provided his expert disclosures and Defendants’ disclosure was

1 therefore timely under Fed. R. Civ. P. 26(a)(2)(D)(ii)”). Plaintiffs’ argument is therefore not made in
2 good faith.

3 On October 21, 2022, twenty-two days after the disclosure of Dr. Fox’s Amended Report,
4 BCBSIL disclosed the Carr Rebuttal Report in response. It is undisputed that Dr. Carr’s rebuttal report
5 was disclosed well within the 30-day window contemplated by Rule 26(a)(2)(D)(ii).

6 Plaintiffs claim that Dr. Fox’s Amended Report “applied the same methodology to new data
7 and contained no new opinions.” Dkt. 99 at 12 n.5. This is incorrect: Dr. Fox materially revised his
8 report to incorporate new statistics from the Williams Institute into his analysis. But regardless of
9 whether Dr. Fox’s material revisions to his initial report impacted his ultimate conclusions, BCBSIL
10 has the right to respond to that Amended Report within 30 days.

11 Plaintiffs claim that the Carr Rebuttal Report is untimely merely because it references Dr.
12 Fox’s initial report as well as his Amended Report. But it makes practical sense that the Carr Rebuttal
13 Report would respond to Dr. Fox’s revised conclusions by referencing both versions of Dr. Fox’s
14 reports. The mere fact that the Carr Rebuttal Report references Dr. Fox’s initial report does not render
15 his rebuttal untimely. Moreover, Plaintiffs do not dispute that Dr. Carr’s rebuttal report analyzes the
16 data from Dr. Fox’s Amended Report in detail. *See* Carr Rebuttal Report at pp. 1, 6-8, 13, 15-20
17 (analyzing the updated data in the revised tables of Dr. Fox’s Amended Report).

18 **B. Plaintiffs’ Disclosure of the Fox Report was Itself Untimely.**

19 Plaintiffs’ timeliness argument is contradictory and without merit. Plaintiffs’ disclosure of Dr.
20 Fox’s Amended Report in late September 2022 was itself untimely. The deadline to serve opening
21 expert reports was June 17, 2022, but Plaintiffs did not serve Dr. Fox’s Amended Report until over
22 two months later, on September 29, 2022. Dr. Fox’s Amended Report was filed 104 days after the
23 expert disclosure cutoff. Then, the Carr Rebuttal Report was timely filed within 30 days of Dr. Fox’s
24 Amended Report.

25 Plaintiffs cannot have it both ways. If Dr. Carr’s rebuttal report is untimely, so too is Dr. Fox’s
26 Amended Report. Thus, if the Court grants Plaintiffs’ Motion to Strike the Carr Rebuttal Report, it
27 should also exclude Dr. Fox’s untimely Amended Report.

1 **C. Plaintiffs Have Not Alleged Any Prejudice.**

2 Plaintiffs do not, and cannot, argue they were prejudiced by the disclosure of the Carr Rebuttal
3 Report. If Plaintiffs truly had concerns regarding their ability to respond to the rebuttal report, they
4 could have taken Dr. Carr's deposition or requested more time to respond, but they have not sought
5 to do so.

6 **IV. CONCLUSION**

7 BCBSIL respectfully requests that the Court deny Plaintiffs' Motion to Strike the Expert
8 Report of Scott Carr.

9 Dated this 2nd day of November, 2022.

10 KILPATRICK TOWNSEND & STOCKTON LLP

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CERTIFICATE OF SERVICE

I certify that on the date indicated below I caused a copy of the foregoing document, BLUE CROSS BLUE SHIELD OF ILLINOIS'S SURREPLY OPPOSING MOTION TO STRIKE CARR REPORT, to be filed with the Clerk of the Court via the CM/ECF system. In accordance with their ECF registration agreement and the Court's rules, the Clerk of the Court will send e-mail notification of such filing to the following attorneys of record:

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DATED this 2nd day of November, 2022.

KILPATRICK TOWNSEND & STOCKTON
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